No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

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Statement of the Case.

These five appellants are persons of the Chinese race who have been ordered deported out of the United States to China by the *executive* deportation procedure of the General Immigration Law for a claimed violation of the Chinese Exclusion Laws which provide only for a *judicial* deportation hearing. There was much diversity in the holdings of the different District and Circuit Courts of Appeals upon this point, but the matter was finally determ-

ined by the Supreme Court in the case U. S. v. Woo Jan, 245 U. S. 552; 38 Sup. Ct. Rep. 207; that such deportations could only be brought about after a *judicial* hearing. The appellee seeks to distinguish these cases from the Woo Jan case in this particular, that the General Immigration Act here in question, is the Act of Feb. 5th, 1917, which so amended the earlier General Immigration Law, as to thereafter permit of the use of the *executive* deportation procedure for violations of the Chinese Exclusion Laws. That the law is so amended is true. Appellants point out however that this last enacted General Immigration Law only became effective on May 1st, 1917, and that they had all arrived in the United States prior thereto, all as shown by the warrants of deportation against them, and more particularly as follows:

Ng Fung Ho, at San Francisco, by ss. Manchuria, July 20, '15;

Ng Yuen Shew, at San Francisco by ss. Manchuria, July 20, '15;

Lui Yee Lau, at Seattle by ss. Yokohama Maru, April 15, '15;

Gin Sang Get, at San Francisco, by ss. China, July 24, 1916; and

Gin Sang Mo, at San Francisco, by ss. Shinyo Maru, April 28, '17,

and they have therefore called attention to and claimed the protection of Section 38 of the last

mentioned act, which, they claim, holds in force the prior existing laws, that is to say, the laws as they were in force immediately prior to the 1st day of May, 1917, which places them squarely within the ruling of the Supreme Court in the Woo Jan case. This briefly stated is the dominant point in these cases, and as it was equally applicable to each of the five, they joined in a common petition in their own names, to be relieved of the illegal restraint.

An examination of the warrants of deportation discloses that Ng Fung Ho and Ng Yuen Shew were not otherwise ordered deported. Not so, however, as to Lui Yee Lau and the brothers Gin Sang Get and Gin Sang Mo. They are also ordered deported for what is claimed to be a specific violation of the General Immigration Law. The first, that he was a person likely to become a public charge at the time of his entry, and the latter two that they had entered without inspection. These are suitable grounds for deportation under the General Immigration Law, provided there is any evidence to support the charges. The appellants claim that they are make-weight charges, entirely unsupported by any evidence, and have only been made by the Secretary by misconstruing the statute. The facts are as follows:

Lui Yee Lau entered the United States as a Chinese merchant having a certificate issued to him under the terms and provisions of Sec. 6 of Act of

May 6th, 1882, as amended by the Act of July 5th, 1884. His entry was effected through the Port of Seattle on April 15th, 1915, by order of the appropriate immigration authority. There was no evidence that he had secured his certificate fraudulently. There was no evidence that he had ever labored in the United States. There was no evidence that he had ever become a public charge in the years following his admission. The basis for the likelihood of becoming a public charge feature of the case, is the fact that almost two years after his admission at the Port of Seattle, he was found in Texas, where he was supposed to have been gambling, and was twice arrested. Upon the first charge he was tried and acquitted. Upon the second occasion he was arrested Jan. 26, 1918, and charged with vagrancy. To this charge he pleaded guilty and was fined $25.00 and costs, making a total of $39.60 which he paid. It is assumed that he suffered some short detention, as a result of these two arrests, prior to his being released upon bail, and because of these matters it is assumed that he was possessed of latent criminal tendencies at the time he arrived here and it is charged that he was likely to become a public charge at the time of his entry almost two years previously.

Gin Sang Get and Gin Sang Mo are additionally charged with having entered without inspection by means of false and misleading statements. However this may be, the *statutory* charge is that the

alien entered without inspection. To this the Secretary has added the qualification, *by means of false and misleading statements.* It is admitted that these two young men were applicants for admission at a regularly designated port of entry, they arrived by steamer, they were taken to the Immigration Station, they were held pending the taking of much testimony and the conducting of a very long and painstaking examination into the claims of their right of admission, and as a result thereof, they were regularly admitted into the United States upon order of the Commissioner of Immigration for this Port. They have consistently contended and maintained that the order so made was proper and that they were entitled as of right to admittance to and residence within the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States.

The petition for the writ sets forth the above facts and has attached thereto copies of the different warrants of deportation. A demurrer was interposed and the immigration records in each of the cases were admitted in evidence by mutual consent. Judge Dooling, then presiding in the lower court, overruled the demurrer and thereupon a return was filed, which set up no new matter. The case was finally submitted to Judge Rudkin, then presiding in the lower court, and his judgment was adverse to the petitioners and they accordingly perfected this appeal. The petitioners were admitted to bail by

the lower court when the petition was first presented and have since so been at liberty.

Argument.

The ten assignments of error made in this matter may be somewhat reduced by consolidating different of the points. The predominant point is common to the rights of each of the five petitioners and will be treated *first;* that is whether a person may be deported as an alien Chinese here in violation of the Chinese Exclusion Laws, by resorting only to the *executive* process contained in the last General Immigration Law, when such person had entered this country prior to the taking effect thereof; if this point is decided as contended for by appellants, there would then remain only the so-called makeweight alleged violations of the General Immigration Act itself made against three of the petitioners, therefore the *second* point is whether the statutory charge of likelihood of becoming a public charge at time of entry, which is made against Lui Yee Lau, is sufficiently supported by evidence and whether the phrase is subject to the latitudinarian construction sought for by the Secretary; while the *third* point is whether the statutory charge of entry without inspection made against Gin Sang Get and Gin Sang Mo is sufficiently supported by evidence and whether that ground of deportation may be supplemented by the charge "by means of false and mis-

leading statements" and if so, whether it is sufficiently supported by evidence. Should these points be decided adversely to petitioners there would then remain the question as to whether the respective hearings accorded by the Immigration authorities were fairly conducted and their conclusions sufficiently sustained by the evidence taken therein. This final point as it affects Lui Yee Lau, may for brevity's sake be treated in the *second* point, and for the same reason, as affecting Gin Sang Get and Gin Sang Mo, may be treated in the *third* point, thus leaving as the concluding point, the *fourth;* as affecting Ng Fung Ho and his son, Ng Yuen Shew, whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence presented.

First.

The appellee claims that these five petitioners are alien Chinese persons here in violation of the Chinese Exclusion Laws, all as more particularly set forth in the various *executive* warrants of deportation. It is shown from an inspection of the *executive* warrants of deportation, that in each instance the person proceeded against had arrived at the United States prior to May 1st, 1917, which was the date the General Immigration Law of Feb. 5th, 1917, became effective, and was not proceeded against until some considerable time thereafter. Ap-

pellants contend that there was no violation of the Chinese Exclusion Laws, but that if there was, such violation must have occurred at the time of the arrival of each appellant at the United States, and such violation was therefore an "act, thing or matter" "done or existing at the time of the taking effect" of the General Immigration Law, and could only be dealt with under the prior existing laws, which were specifically "continued in force and effect" in their original form for such purpose, which necessitated a *judicial* instead of an *executive* deportation proceeding.

The Act of Feb. 5th, 1917, concludes with Sec. 38, which is in part as follows:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * *
>
> *Provided*, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof, * * *.
>
> *Provided further*, That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceeding brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

As for the Chinese Exclusion Acts, it is only necessary to generally call attention to the fact that *exclusive jurisdiction to deport* Chinese persons or persons of Chinese descent is conferred upon the *judicial branch* of the government. Act of May 6, 1882, as amended by the Act of July 5, 1884, Section 12 (22 Stat. L., 58; 23 Stat. L., 115); Act of Sept. 13, 1888, Section 13 (25 Stat. L., 476, 477); Act of May 5, 1892, Section 2, Section 3, Section 6 (27 Stat. L., 25); Act of Nov. 3, 1893, Section 6 (28 Stat. L., 7); Act of Mar. 3, 1901, Sections 1, 2, 3 (31 Stat. L., 1093); Act of April 29, 1902 (32 Stat. L., part 1, 176); Act of April 27, 1904 (33 Stat. L., 394-428). The exclusive character of this judicial deportation procedure has been upheld by the Supreme Court in the Woo Jan case mentioned in the statement of this case and need not be further referred to. This present Act as affecting the Chinese Exclusion Laws, amends its predecessor by the addition of the phrase *except as provided in section nineteen hereof.* Section 19 of the Act of Feb. 5th, 1917, designates the different classes of aliens whose presence shall be deemed objectionable and provides for the *executive* deportation procedure by the Secretary of Labor. The purpose of this amendment of the Chinese Exclusion Laws was unquestionably to at least invest concurrent if not exclusive jurisdiction upon the Secretary of Labor to exercise his *executive* deportation prerogative. The question here presented is whether this newly created power of the Secretary can have any *retroactive*

effect to cover prior alleged violations of the Chinese Exclusion Laws, in view of the sweeping saving clause which concludes the Act, and which ends as follows: *"but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect".*

It will be noted that this saving clause is most sweeping, embracing matters both criminal and civil, and also whether in action or not, but the possible subject of future action, at the time of the taking effect of the Act, to-wit, May 1st, 1917. To this saving clause there is one exception placed in the middle: *"except as mentioned in the third proviso of section nineteen hereof".* This third proviso is as follows:

> *"Provided further,* That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States:"

It is at once observed that this sole exception to the saving clause contained in Section 38, has *plural* exceptions to its own scope of action. What are these exceptions? They must be first ascertained so that they may be withdrawn, for only in that way may be known the extent of the limitation on the saving clause contained in Section 38. An analysis of Section 19 discloses that it enumerates the various classes of aliens whose faults or misfortunes, as the case may be, renders their future residence

in this country objectionable, and according to the gravity thereof sets the time within which they may be deported, and it finally places them in three groups; the first of which we will call the *mild* offenders, may be deported within *three years after entry,* the second of which we will call the medium offenders, may be deported within *five years after entry,* while as to those remaining and who constitute the third group which we will call the extreme offenders, they may be deported *at any time after entry.* We therefore contend that the *"exceptions hereinbefore noted"* must of necessity be the three and the five-year groups, the mild and medium offenders which form the exceptions referred to in the third proviso of Section 19. This solution is not only reasonable and consistent, but is entirely in keeping with the grading of the offenders according to the gravity of their offending. Accordingly we observe from Section 19 that those who enter in "violation of any other law of the United States" which includes the Chinese Exclusion Laws, may be deported "at any time within five years after entry", and are therefore without the third proviso of Section 19, and hence are not affected by the withdrawing proviso contained in the saving clause in Section 38. In other words, as to the mild and medium offenders against the General Immigration Law, or the other laws of the United States brought thereunder, the prior existing laws were held in force as to such "prosecutions, suits, actions, proceedings, acts, things, or matters". As to the third

group, that is to say, the extreme offenders, they are withdrawn from the protection of the saving clause in Section 38, and may be deported "irrespective of the time of their entry into the United States". Adopting this view of the matter, these appellants having been charged by the Secretary of Labor with having entered the United States in violation of the Chinese Exclusion Law, such offense if committed at all, was complete and was "an act, thing or matter" "done or existing at the time of the taking effect" of the last General Immigration Law, May 1st, 1917, and they could accordingly only be prosecuted therefor under the prior existing laws which were continued in force for such purpose. Woo Jan v. U. S., supra, which necessitates a judicial proceeding.

The exact point here raised was before the Circuit Court of Appeals for the Fifth Circuit in the case of Mayo, Immigration Com'r, v. United States, 251 Fed. 275. It is disclosed by the transcript of the record in that particular case, that there, as here, there were five Chinese persons arrested upon the Secretary's executive warrants. The trial court discharged them from custody. The government appealed all of the cases and stipulated that the four remaining cases might follow the decision to be rendered in the first case which is the one mentioned above. The court there held as follows:

> "It is difficult to determine just what is meant by the third proviso of section 19; the exception to the last proviso of section 38 is

> not more clear. To give to the latter the meaning suggested by the government would be to permit the exception to substantially (if not absolutely) destroy the proviso. It way be possible to ascribe a meaning to each clause which would give effect to both. If the third proviso of section 19 be held to make that section applicable to all aliens, without reference to the time of their entry, who do, after the passage of the act, something denounced by the act, and if the last proviso of section 38 be held to preserve the status existing at the time of the passage of the act as to all aliens who commit no new offense thereafter, consistency and effect would be given to all the language under consideration. Under this view the 'things and matters' 'as they existed' with relation to the relator 'at the time of the taking effect of the act'—that is, his status as an alien in the country in violation of the Chinese Exclusion Law—will be dealt with by the law as it was before the passage of the act.'

There is but one point in the case at bar in which it differs from the case just cited. The right of the alien (Lee Wong Hin) in the Mayo case to reside in the United States was *in action* at the time of the taking effect of the General Immigration Law, whereas with respect to these appellants, if they had violated the Chinese Exclusion Law in their entry or re-entry into the United States, such violation was then and there an "act, thing or matter, civil or criminal, done or existing at the time of the taking effect" of the last General Immigration Law, though *not then in action.* This difference however does not affect the legal status of the case, this for the reason that the saving clause in

Section 38 is unusual, by reason of including acts, things and matters not in suit or action; but we submit, the very fact that such acts, things and matters are specifically named shows an unmistakable intent upon the part of Congress to save the prior acts as to them, as well as to the acts, things and matters on suit or action.

It is felt that there would have been more certainty in the expression of the opinion of the court in Mayo v. U. S., supra, had the industry of counsel directed the attention of the court to prior legislation and the judicial construction thereof. Thus the prior Immigration Act, that of Feb. 20th, 1907, contains in Section 28 almost exactly the same saving clause. This Act is construed in Botis v. Davis, 173 Fed. 996, and it is there held on page 999 as follows (after setting forth Section 28):

> "The act of 1907, therefore, is wholly prospective in its operation. The language used in the quoted section could hardly be made more comprehensive or explicit. All acts, things, and matters done or existing when the statute took effect are governed by earlier laws. The date of taking effect was July 1st, 1907, several months after Botis landed. So there can be no question that the act of 1907 has no bearing or effect on Botis' status, which is governed entirely by pre-existing laws. * * *"

In viewing this same Act, that of 1907, the Circuit Court of Appeals for the Seventh Circuit in the case of Davies v. Manolis, 179 Fed. 818, clearly support this view, holding that the alien having entered the country in August, 1906, long prior to

the enactment of the Act of Feb. 20th, 1907, he could not be deported thereunder. If he had violated a prior Immigration Act he must be specifically charged thereunder and given a hearing under the then existing law.

Pressing the research further, we find that the next earlier Immigration Act was that of March 3, 1903 (32 Stat. L., 1220), wherein Section 28, though differently worded, covered the same legislative intent as expressed in Section 28 of the Act of Feb. 20th, 1907, and Section 38 of the Act of Feb. 5th, 1917. This legislation was construed by the Circuit Court of Appeals for the Seventh Circuit in the case of Lang v. U. S., 133 Fed. 201. The court there held:

> "* * * No prosecution could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecution begun under that statute, whether they were then pending, or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word "begun" is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought."

See also the concurring opinion of Jenkins, Circuit Judge.

It is further submitted that the legislative intent here manifested is reflected from earlier enactments, notably Rev. St., Section 13 (U. S. Comp. St. 1901,

p. 6), enacted in 1871, and commented upon in Judge Jenkins concurring opinion. It finds a more recent expression in Section 299 of the Judicial Code.

In the case of Russomanno, 128 Fed. 528, the Circuit Court, Lacombe, Circuit Judge, held:

> "The authority to deport this alien is to be found in the act of 1891 (Act March 3, 1891, c. 551, sec. 11, 26 Stat. 1086 (U. S. Comp. St. 1901, p. 1299)), not in the act of 1903. In as much as he was not seized, even, for purposes of deportation, until more than a year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the act of 1891 had fully expired.
>
> The prisoner is discharged."

In the opinion filed in this case by Judge Rudkin, wherein he sets forth the reasons which impelled him to dissent from the opinion of the Circuit Court of Appeals for the Fifth Circuit in Mayo v. U. S., supra, he in part adopts our reasoning wherein he holds:

> "But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19 and that proviso is expressly made applicable to all classes of aliens irrespective of the time of their entry into this country. True there is excepted from the third proviso 'the exceptions hereinbefore noted' which doubtless has reference to the time limit imposed on the deportation of certain classes of aliens,—"

but we feel that from this point on the court erred, the opinion proceeds:

> "* * * but inasmuch as no court would permit the deportation of an alien after the time fixed by law for such deportation had expired, simply because the act was made reactive, the exception is meaningless. In other words, the words last quoted are superfluous and add nothing to or take nothing from the statute as a whole."

Here we have the court, by a bold direct stroke, eliminating entirely from the act, exceptions which Congress in its wisdom saw fit to place therein. The trial Court holds "the exception is meaningless", but we submit that the fact that Congress placed the exception there, conclusively implies that it is not meaningless but that it has a real and substantial purpose for being in the Act. We feel that the trial court erred. We feel that the Supreme Court announced a very safe rule when, in the case of Wiborg v. U. S., 163 U. S. 623, it was held, speaking through Chief Justice Fuller, respecting statutory construction,

> "that its every word should be presumed to have some force and effect".

Upon the subject of this Act the lower court holds as follows:

> "It will readily be conceded that the act is awkwardly worded, to say the least. Exception is grafted on to exception and proviso on to proviso until the meaning, in some instances at least, is well nigh incomprehensible, as is too often the case with bureaucratic legislation."

An inspection of Section 19 discloses that it has six such provisos or exceptions "grafted" on it.

The purpose of these provisos and exceptions was to reflect in the Act itself various of the court holdings and interpretations of the prior existing Act and to make some changes to conform to subsequent holdings of the courts. Of this there is no question, as a reading of these various concluding portions of the section at once calls to mind the cases from which they were taken or which caused them to be so added to the Act. Of all of these different matters, the *third proviso* reflects by far the most important of the litigation which followed the enactment of the earlier Act of Feb. 20th, 1907, and also the Act of Mar. 3rd, 1903, for that matter. That is the question as to whether this legislation applied to *alien immigrants alone* or whether it applied to *domiciled aliens as well.* This point was variously decided by many of the district courts and by the appellate courts. This court in the case of Moffitt v. U. S., 128 Fed. 375, and in the subsequent case of U. S. v. Nakashima, 160 Fed. 842, held as respects each of the two acts mentioned, that they only applied to *aliens who were immigrants,* and not to those who were *domiciled aliens.* This point was finally settled by the Supreme Court in its decision in the case of Lapina v. Williams, 232 U. S. 78; 34 Sup. Ct. Rep. 196, by the holding that the acts applied to aliens, whether returning to a previously acquired domicile or as immigrants. This decision was rendered Jan. 5th, 1914, and comments at length upon the earlier conflict of judicial opinions and the importance of the point. When we consider that this present Act is mainly a recodification

of the prior existing immigration legislation, it is all the more apparent that Congress would want to make it very plain, that while the wording of the Act may have been changed, there was to be no change as to whether the legislation applied to domiciled aliens or not and whether domicile could be asserted to defeat deportation. For this reason, we submit, this third proviso was inserted. How complete it is for the purpose is most obvious. Note the language—the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. Congress here gave protection the right of domicile when over three years, for the mild offenses; when over five years for the medium offenses, and no such protection, no matter how long the domicile, for the more serious offenses. When we take this view of the matter it is at once apparent why this proviso was inserted in the saving clause contained in Section 38. Congress did not intend that the more serious offenders, that is the moral degenerates, the outcasts, the enemies of civilized peoples and organized governments, should ever be heard to assert the right of domicile to defeat an effort to deport them out of the country. We assert that this, in our opinion, is exactly what Congress intended to and what it in fact did do.

This creates no hiatus in the enforcement of the law. On the contrary, it holds in force the law which has been violated for the express purpose

of the prosecution, either criminal or civil, of all transgressions against it. Thus a person who has offended against the prior Immigration Act, may be arrested and charged with such violation and made to answer thereto. A person who has offended against the Chinese Exclusion Laws prior to the amendment thereof as contained in the last Immigration Law, may be arrested and charged with such violation as provided in the Chinese Exclusion Laws, which necessitates a *judicial* hearing all as held by the Supreme Court in the Woo Jan case. To deport under the present Immigration Law for a violation of a prior Immigration Law, matters little to such a defendant, the procedure of deportation being the same under both the old and the new Immigration Laws, always provided of course that it is made clear to the defendant what law he is charged with having violated. This does not hold good however when the violation complained of is of the Chinese Exclusion Laws prior to May 1st, 1917, for as to such violation, the judiciary, under those laws as then existing, has exclusive jurisdiction.

Another point to be made in connection with these cases is that three of them, the first three, all arose with the Fifth Circuit, where the decision of the appellate court of the Circuit in Mayo v. U. S., supra, is supposed to be the prevailing law. The government accepted that decision. They did not ask either a rehearing or for *certiorari*. In spite of this we find the Immigration Department,

even in cases which arose within that circuit, in effect ignoring the decision in a like case in which they were a party. The case was decided in the lower court July 24, 1917, which was prior to the issuance of any of the warrants of arrest in these cases. In attempting to overrule or ignore that decision, they should be held to abide their election and their jurisdiction failing, an order of absolute discharge should be made herein. That was even then the order on July 24, 1917. The decision of the Circuit Court of Appeals in Mayo vs U.S. supra, was rendered on April 12,1918, and even that was prior to the issuance of the warrant of deportation against the appellant Lui Yee Lau. Having invoked that appellate jurisdiction, and having accepted that decision without either asking a rehearing or certiorari, it is felt that in the practice within that district and circuit at least they should be guided by it.

SECOND.

The second point affects Lui Yee Lau, otherwise referred to as Louie Pon. It is whether the statutory charge under the General Immigration Law that "He was a person likely to become a public charge at the time of his entry into the United States" and the statutory charge under the Chinese Exclusion Law, he having entered with a merchant's certificate (commonly referred to as a Section 6

Certificate) "but having become a laborer since admission" are sufficiently supported by evidence and whether they fall within the respective statutes, and herein generally whether the statutes are subject to the latitudinarian construction sought for by the Secretary.

The facts upon which these two charges are based are the same in each instance. This Chinese alien entered through a regular port of entry, Seattle, Washington, on April 15th, 1916, by order of the appropriate immigration authorities, after having produced his Section 6 Merchant's Certificate and being subjected to the usual examination with respect thereto. He has never been a public charge nor has he ever labored since his admission to the United States, as those terms are generally understood. The government however takes the position that almost two years after his admission, at Seattle, he was found in Texas, where he was supposed to have been gambling, and he was twice arrested. Upon the first charge he was tried and acquitted. Upon the second, the arrest occurring on Jan. 26th, 1918, he was charged with vagrancy, pleaded guilty and was fined $25 and costs, making a total of $39.60 which he paid. *It is assumed though not proven* that he suffered some short detention as a result of these two arrests prior to his being released upon bail. Because of these matters it is charged that he was possessed of latent criminal tendencies at the time he arrived here and it therefore assumed that he was likely to become a public charge at the time

of his entry by reason thereof, which is violative of the General Immigration Law, and further that as a gambler is a laborer, he has labored since his admission into the United States, which is violative of the Chinese Exclusion Act. This is the theory of the government as affects this appellant.

Both of these exact identical points were recently before Judge Dooling, in the case of Lui Sin Fan, ...Fed....., wherein the court held as follows:

> "The detained is a Chinese who has been ordered deported. He was admitted as a Section 6 Canton merchant on January 14, 1916. It is not charged that he entered fraudulently, but that he became a laborer after his admission.
>
> But in Lui Hip Chin v. Plummer, 238 Fed. 763, the Circuit Court of Appeals for this Circuit have held that this is not a ground for deportation. It is also charged that at the time of his admission he was a person likely to become a public charge. This is predicated on the fact that in January, 1917, he was arrested on a charge of statutory rape, to which he pleaded guilty, and was sentenced to three months in the county jail and to pay a fine of $100.00.
>
> It is the opinion of the bureau that his commission of this offense shows that at the time of his entry he was a person likely to become a public charge because of his criminal tendencies. The question thus presented has not, so far as I have been informed, been authoritatively decided. But the same act which provides that one likely to become a public charge may be excluded, also provides that one may be deported, who has been sentenced to imprisonment for a term of one year or more because

of conviction in this country of a crime involving moral turpitude.

It seems to me that the detained is really ordered deported because he was convicted of an offense which carried with it only a sentence of imprisonment for three months, although such deportation is put upon another ground. I have never been fully satisfied that the words 'likely to become a public charge' mean 'likely thereafter to commit some offense which will occasion imprisonment'. This seems as good a case as any by which to find out what the words really mean. As I do not agree with the bureau's construction, I think the burden should be upon the Government of taking the case to the Court of Appeals."

In passing it may be stated that the government accepted the decision above set forth and did not appeal therefrom. Attention is also directed to the recent case of Howe v. U. S., 247 Fed. 292, by the Circuit Court of Appeals for the Second Circuit, wherein this same "likely to become a public charge" element was involved. The court there held as follows:

"Indeed, with such latitudinarian construction of the provision 'likely to become a public charge', most of the other specific grounds of exclusion could have been dispensed with. Idiots, imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis and prostitutes, might all be regarded as likely to become a public charge. The excluded classes with which this provision is associated are significant. It appears between 'paupers' and 'professional beggars'. We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses

> for want of the means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary. * * *"

Further cases illustrative of this same judicial leaning are Ex parte Hill, 245 Fed. 687, and Ex parte Mitchell, 256 Fed. 229. All of these cases in reality follow the decision of the Supreme Court in Gegiow v. Uhl, 239 U. S. 31, wherein the phrase "likely to become a public charge" was judicially construed and commented upon.

As to whether the evidence in the record would sustain an order of deportation under the terms of the Chinese Exclusion Act we say most emphatically no. It is not charged that he obtained his Section 6 Certificate by fraud or any indirection or that any of its recitals are untrue. On the contrary, it is merely and exclusively charged therein with "having become a laborer since admission" (see warrant of deportation against Lui Yee Lau). This exact point was before this court in the case of Lui Hip Chin v. Plummer, 238 Fed. 763, and it was there held that it was not a ground of deportation. This case has abundant legal support set forth therein to substantiate the conclusion reached. The cases need not be repeated herein. This case is controlled by that decision, for the point is exactly the same. The court there said:

> "The fact that one who has been admitted into the United States as a merchant subse-

quently becomes a laborer is not in itself ground for his deportation.

"There was no charge that the appellant entered the United States with the intention of becoming a laborer, or that he procured his certificate as a merchant by means of fraud or misrepresentation. If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it.

"But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

That in the immigration record of Lui Yee Lau it is practically admitted that there is no merit in the charge that he violated the Chinese exclusion laws. The extract is taken from page 15.

> "It is doubtful that the charge that he secured admission by fraud by representing himself to be a merchant can be substantiated, as the alien claims that he was a bona fide merchant in China prior to his departure for this country, and there is no evidence controverting such claims."

In finally submitting this point as to the appellant Lui Yee Lau, we state that whether his case be viewed through the procedure of the General Immigration Law as to the claimed violations of that law and also of the Chines Exclusion Law, or as to the latter claimed violation of the Chinese Exclusion Law, trialable alone as we claim before the judicial branch of the government, we must come to the same conclusion, namely, that there is no evidence in the record upon which, as a matter of

law, deportation can be based, by whatsoever procedure followed. Hence we submit that upon the merits of the case as disclosed from the immigration record in Lui Yee Lau's case, he is entitled to an absolute discharge.

THIRD.

The third point affects Gin Sang Get and Gin Sang Mo, brothers, who are the foreign-born sons of a native-born citizen of the United States, and hence are themselves citizens of the United States. It is whether the statutory charge under the General Immigration Law that "He entered without inspection, by means of false and misleading statements" and the charge under the Chinese Exclusion Law with "being a Chinese laborer not in possession of a certificate of residence", which is separately made as to each of the brothers, are sufficiently supported by evidence and whether the charges as claimed fall within the respective statutes.

By referring to the warrants of deportation as to these brothers, we find that it is charged that the first, Gin Sang Get entered on the 24th of July, 1916, and the second, Gin Sang Mo, entered on April 28th, 1917. In each instance it is disclosed that the appellants arrived at a regularly designated port of entry for Chinese and immigration purposes upon regular passenger steamers, that they were duly taken to the immigration station and

after a protracted examination of witnesses and examination of prior immigration records, and making of reports by the government's investigative officers, these boys were ordered admitted into the United States as citizens thereof by the Commissioner of Immigration for the Port of San Francisco, thereafter applying for and receiving their certificates of identity. Here was no entry without inspection. On the contrary, here was an entry after a most rigid and protracted examination made upon the order of the Commissioner of Immigration. But the Secretary states "by means of false and misleading statements", thus by a latitudinarian construction of the statute adding something to it which changes absolutely its meaning. Has the Secretary of Labor power to take the statutory ground of deportation "who enters without inspection" and add the qualifying and contradictory phrase "by means of false and misleading statements" and so completely change the charge as to made it a flat contradiction of the congressional will? The extraordinary power which Congress (Section 19, last Immigration Act) gave the Secretary was to reach the cases of

> "any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection".

These appellants have not violated these statutory provisions but on the contrary have complied with them. They entered at a duly designated port of entry, at a time and place where they were received, inspected and examined by the immigration officials, they were taken to the Angel Island Immigration Station and held and examined, their cases were reported upon, considered at length, and thereafter they were duly landed by order of the immigration officials. The records in each of their cases show this. The extraordinary power which Congress gave the Secretary was to reach the cases of those who evaded inspection, examination and compliance with the order disposing of their cases. When this charge is established it means deportation, irrespective of the fact that the person might have been admissable into the United States, had he submitted his claims to the immigration officials and been content to abide their decision. Congress did not extend it to those who had complied with all of the forms and procedure exacted by the statute. Certainly this is an attempted amendment to the law, not an interpretation of it. To enter without inspection has a clear cut, well defined meaning which leaves no room for doubt in the mind of a person as to the issue he has to meet, which is what Congress intended it should be, simple and direct, with no chance of a misunderstanding. To enter without inspection, *by means of false and misleading statements,* is in itself a violent contradiction. Not only this, but it is manifestly vague and am-

biguous, affording the person charged no adequate information of what he has to meet. It is without the authority of the statute and therefore lacks binding force and effect. It is not "within the authority of the statute" which is one of the essential prerequisites as held in Low Wah Suey v. Backus, 225 U. S. 460, by the Supreme Court, and further commented upon in Gegiow v. Uhl, 239 U. S. 31, supra. In the case of Howe v. U. S., 247 Fed. 292, supra, the same charge of entry without inspection, to which must have been added the qualification here complained of, was involved, and there as here it was shown that the person had entered after inspection and a submission of his claims of admission to the immigration authorities, upon whose order he was admitted. The appellate court there said as to this charge:

> "There seems to us to be no ground whatever for saying that he entered in violation of law."

This entry without inspection charge was formerly considered by Judge Dooling in the case of Wong Tuey Hing, 213 Fed. 112, to which the attention of the court is most respectfully invited. The court said:

> "If he entered without inspection, as the warrant of deportation recites, it was because the immigration officials did not desire to inspect him, not because he prevented them from so doing",

and after calling attention to Rule 3 of the Chinese Regulations:

> "It is eivdent therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor. He complied with every requirement of the law to establish his status as a Chinese entitled to depart from and return to this country. If that status is to be inquired into again a year after his re-entry into the country, it should be inquired into under the exclusion laws and not under the immigration act."

In the case of General Castro (203 Fed. 155), reported as U. S. v. Williams, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected."

In Redfern v. Halpert, 186 Fed. 150, the appellate court for the Fifth Circuit held with approval:

> "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed."

We submit that there is nothing to support the contention that these young men entered the United States in violation of that part of the Immigration Law which prohibits entry without inspection.

The contention of the government that they could so interpret the statute by regulation must fall to the ground. It is against all of the cases upon that point. Morril v. Jones, 106 U. S. 466, it is held:

> "In our opinion, the object of the secretary could only be accomplished by an amendment to the law. That is not the office of a treasury regulation."

See also U. S. v. George, 228 U. S. 14, where the court, through Mr. Justice McKenna, said:

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department?"

In the case of U. S. v. United Verde Copper Co., 196 U. S. 207, the court, speaking again through Mr. Justice McKenna, said:

> "If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

We submit that vast powers are given the immigration officials in the legislation under consideration. Those powers are so almost unlimited in their scope that we are struck with wonder that any attempt should be made to enlarge upon them by indulging in such dubious construction. Certainly

there must be a limit somewhere and the court is most respectfully called upon to define it. We feel that this alleged violation of the Immigration Law is nothing but a makeweight charge thrown in against these appellants in a vain endeavor to bring these cases within their executive jurisdiction, the department knowing before it had issued its warrants of deportation that the Circuit Court of Appeals for the Fifth Circuit had already held that the Secretary was without jurisdiction where the Chinese Exclusion Law alone was involved.

Turning our attention now to the case of these two boys upon the merits, we find that whether examined under the one law or the other that their claim of American citizenship should have been recognized. The additional safeguards of a judicial hearing with all the sanctity of its procedure and the impartiality of its hearing and ultimate judgment (as set forth in Woo Jans case), would have given these appellants a more fair and adequate opportunity to present their defense. Even so and considering the limitations which the executive character of the hearing placed them under, we feel that their case of American citizenship was fully and fairly made out when they were applicants for admission into the United States, all as shown by the records in the admission cases of each thereof. After being duly admitted into the United States they had issued to them their respective certificates of identity, and this attempt of the immigration officials to now retry that issue and determine it

adversely upon suspicion and conjecture should not be encouraged. There is a growing tendency in the decisions of the courts to hold these immigration decisions in favor of admission, and the certificates of identity issued under departmental regulation for the future protection of such former applicants for admission, as entitled to the recognition of the courts as establishing a prima facie right of residence, in the absence of a satisfactory showing of error. See the case of Liu Hop Fong v. U. S., 209 U. S. 453, where the court said "certainly the certificate ought to be entitled to some weight". In the case of U. S. v. Hom Lim, 214 Fed. 456, at 463 the court said:

> "The decision of his right to enter was presumptively correct, and, unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex parte Wong Yee Toon, 227 Fed. 247, at 251 the court said:

> "Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

And in the same case upon appeal to the Circuit Court of Appeals, Wong Yee Toon v. Stump, 233 Fed 194, at 196 the court said:

> "After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes

as evidence that it should be annulled before an order for deportation is warranted."

In the case of Lui Hip Chin v. Plummer, 238 Fed. 763, supra, this court held:

"But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

Attention is also directed to the recent case of Lum You, 262 Fed. 451, wherein Judge Dooling held as follows:

"The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was about 12 years old. In 1916 he returned to China without a preinvestigation of his status, because of the serious illness of his mother in China whom he desired to see, did not afford him time for such preinvestigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American citizen has already been determined, who has lived a number of years in this country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but

> I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

Attention is also directed to the case of Chan Wy Sheung, 262 Fed. 221, wherein it is held:

> "I am fully aware of the limited power of the court in matters of this kind and of the force and effect that must be given to the findings of the department, but I am of the opinion that the question here presented is one of law rather than of fact and I cannot sanction the injustice that would result from excluding the applicant from the country at this late day under the circumstances disclosed by this record. The decisions of the department after a full hearing should be given some effect and should not be overturned or set aside in subsequent cases upon any such pretext or for any such reasons as are here assigned."

This point is submitted upon the immigration record in the admission case and as supplemented by the record in the deportation proceeding. We feel that the burden of the government, under the Immigration Law and the decisions here quoted, of showing some real substantial evidence to support them in attempting, at this late date and in this disadvantageous kind and class of a hearing, to set aside the former finding of American citizenship of these two appellants by the appellee herein, has been a failure, no such evidence being disclosed. These two appellants were originally admitted into this country as citizens thereof by order of the appellee herein after a most protracted examination of many witnesses, inspection of records, reports

of inspectors and so on. Their landing was proper. They were given certificates of identity as evidence of their lawful residence as citizens within this country. They have consistently maintained the lawfulness of their residence here and are within the protection of our constitutional guaranties, mentioned in General Castro's case (203 Fed. 155), and it is most respectfully submitted that they are entitled to be relieved of the restraint imposed by the warrant of the Secretary. See the recent case of U. S. v. Low Hong, 261 Fed. 73, by the Circuit Court of Appeals for the Fifth Circuit wherein the determination of American citizenship was not held to be dependent upon the investigation and determination thereof by the Secretary.

FOURTH.

This, the final point in the case, affects the first two of the appellants, Ng Fung Ho and his son, Ng Yuen Shew whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence contained in the record.

Ng Fung Ho was readmitted into the United States as a Chinese merchant returning to his previously acquired domicile. He presented the evidence required by the statute in such cases exacted and was readmitted. The evidence of the then minority and the existence of the relationship of father and son between Ng Fung Ho and Ng

Yuen Shew was then and there established and is still conceded (we believe we are correct in this) to be correct. The status of the son Ng Yuen Shew is held to be entirely dependent upon the status of the father, Ng Fung Ho, his right of continued residence standing or falling with his.

Upon this point these appellants are alien Chinese, entitled under the Chinese Exclusion Law to a judicial hearing to test the legality of their continued right of residence. They entered this country almost two years before the present General Immigration Act became effective. The son was landed by order of the Secretary of Labor, and in reaching that order the lawfulness of the domicile of the father was recognized. For the period of almost two years after their admission, had their right of residence been assailed, it could only have been done by a judicial proceeding. That was a valuable right attached to their right of residence in this country (Woo Jan's case, supra). To attempt to now deport them without such judicial hearing is to deprive them of a fair opportunity to safeguard their right of residence in this country. They presented the evidence exactly by the statute, by the kind of witnesses exacted therein, and it was so determined by the officials whose duty it was to pass upon the facts, and they were and are therefore entitled to residence in this country. Chin Fong v. White, 258 Fed. 849. They were issued certificates of identity and, under the line of authorities set forth in the two preceding points, these were not to

be ignored. They were presumptively correctly admitted. We feel that full justice to these two appellants may only be accorded them by a judicial hearing.

These cases are finally submitted as to each of the four points involved. Attention is again called to the statement thereof. If the first point is sustained in favor of appellants, there would still remain the second and third points as solely affecting the alleged specific violations of the General Immigration Law. Should the first point be decided adversely to the appellants, there would yet remain the second, third and fourth points, the sustaining of any of which would mean the release of the appellant or appellants whose rights are therein affected, irrespective of the adverse finding upon the jurisdictional feature involved in the first point. We feel that any final judgment in favor of any or all of the appellants should be that of an absolute discharge.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,

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Attorney for Appellants.